NO'S 172, 173 and 230.

ALEXANDER FLEMING, APPELLANT,

vs.

JAMES T. SOUTTER, SURVIVOR &c., APPELLEE.

No. 172.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, APPELLANT,

vs.

JAMES T. SOUTTER, SURVIVOR, &c., APPELLEE.

No. 173.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, APPELLANT,

vs.

JAMES T. SOUTTER, SURVIVOR, &c., APPELLEE.

No. 230.

These are appeals from two decretal orders made in the case of Soutter, survivor, &c., second mortgage case, for the sale of the east division of the La Crosse and Milwaukee Railroad.

No's 172 and 173 are two appeals from the same order, and No. 230 is an appeal from a subsequent order of sale. The record of the two first appeals is found in the volume contain-

ing the record No. 161, at pages 146 to 156. The decree of foreclosure and sale first entered in this cause January 13th, 1862, was appealed to this court and reversed at December term 1863, and the mandate of this court, sent to the circuit on that appeal, directed among other things, as follows:

"And it is further ordered that this cause be, and the same is hereby remanded to the circuit court of the United States for the District of Wisconsin, with direction to enter a decree for all the interest due, and secured by the mortgage, with costs. * * * * And in case such balance is not paid within one year from the time of the order of the court ascertaining it, then an order shall be entered directing a sale of the mortgaged premises, under the direction of the court; and on bringing the proceeds into court they shall be applied to the payment of the balance of interest; and if they exceed such balance, shall be applied to the future accruing interest, down to the sale; and if they exceed that, to the principal. * * * * And, further, that in case the interest upon the bonds is paid without a sale, the decree shall remain as security for subsequent accruing interests, and ultimately for the principal."

Record 280 of 1864, p. 9.

On this mandate the circuit court on the 27th day of September, 1864, entered its final decree, ordering and decreeing among other things as follows:

"And it is further ordered, adjudged and decreed that unless the said sum of four hundred and forty thousand dollars be fully paid at or before the expiration of one year from the date of this decree, that the usual order will be made for the sale of the mortgaged premises, &c. And it is further ordered and adjudged that after the expiration of the said year, the complainant shall be at liberty when further instalments of interest shall be due and remain unpaid, or when the said principal sum shall be due and remain unpaid, to apply for an order for a sale of the said mortgaged premises, as directed by and in accordance with the mandate of the supreme court."

Record 280 of 1864, p. 261.

An appeal was taken from this decree, by the Minnesota Company to the supreme court, (said record 280 of 1864,) and the decree was affirmed as a compliance with the mandate of this court, 2 Wallace, 510. Afterwards, and on the 28th day

of September, 1865, an order of sale of the mortgaged premises was made for the interest due and remaining unpaid on said mortgage.

Record No. 62, pp. 36 to 38.

Prior to the sale, and on the 4th day of January, 1866, the interest then due was paid, and the proceedings for a sale stopped. Subsequently, and on the first day of September, 1866, default was made in the payment of the instalment of forty thousand dollars falling due on that day. The complainant Soutter on the 10th day of September, 1866, applied to the circuit court by petition setting forth said default and praying that an order of sale in the usual form might be made as provided in the said decree of foreclosure rendered in this suit.

Record 146 and 147.

On the 17th day of September the parties appeared in the circuit court and said petition came on to be heard, and was argued by counsel. The court took the same under advisement, and on the 18th day of September, 1866, made the order of sale as prayed.

Record 147 to 149.

On the same day Alexander Fleming, who claimed to be a party defendant in this suit, prayed an appeal and supersedeas from said decretal order, which was allowed.

Record 149 and 150.

On the 29th day of September the Minnesota company prayed an appeal and supersedeas from the same decretal order, which was allowed, and is the appeal No. 173.

Record 150.

On the first day of March, 1867, default was made in the payment of the instalment of interest of forty thousand dollars which fell due on that day, and on the 5th day of said March the complainant Soutter applied to the circuit court by petition setting forth the said default and praying an order of sale of the mortgaged premises, in accordance with the

decree in this action, notice of which application was served upon the Minnesota company. On said 5th day of March the usual order of sale was made by the court, in accordance with the decree in this cause, and on the 6th day of March the Minnesota company prayed an appeal, which was allowed.

Record 230 of this term.

The only grounds of appeal upon which it is proposed to ask a reversal of these orders, so far as we have been able to learn from the counsel opposed, are—

First. That the practice in procuring these orders was erroneous, in that the application therefor should have been by supplemental bill, instead of by petition.

Second. That the instalments of interest were not due until the expiration of sixty days from the first days of March and September respectively.

Let us briefly examine these objections.

I.

The application by petition was regular. No supplemental bill was required in this case.

The application was upon the decree of the court. That decree had established the rights of the parties, and the relief prayed was based upon it. It was an application for an order of sale on the foot of that decree.

A supplemental bill in such a case is never required. To require the filing of a supplemental bill, would defeat all the benefits to be derived from having the decree stand as security for subsequent defaults. The object of having it so stand is to avoid the expense and delay of a suit.

Lansing vs. Capron, 1 John. Ch'y, 617.

Campbell vs. Macomb *et al*, 4 John. Ch'y, 534.

The former practice in such cases was for the complainant as often as subsequent interest became due "to go before a master upon the foot of the decree and obtain a report as to the sum then due and payable, to the end that such report being made to this court, an order might (may) thereupon be made for a further sale," &c.

Brinckerhoff vs. Thallheimer, 2 John. Ch'y, 485.

Marshall vs. Thompson, 2 Munford, 412.

It was proper for the court to act as its own master, and ascertain the amount due, as is usually done in cases where there is no dispute about amounts. The proper practice now is to apply to the court by petition.

2 Barbour's Ch'y Pr., 183 and 184.

2 Daniels' Ch'y Pr., 1203.

The Revised Statutes of Wisconsin provide for this practice. If payment of interest, with costs, is made before the entry of an order of sale, the suit must be dismissed; butif made after an order of sale, "the court shall enter a judgment of foreclosure and sale, to be enforced by a further order of the court upon a subsequent default in the payment of any portion or instalment of the principal, or of any interest thereafter to grow due."

Revised Statutes of Wis., 858, §§ 4 and 5.

A supplemental bill is inappropriate and improper in such a case, and the proper practice is by petition, or some other summary proceeding, to inform the court of the default.

The appellants appeared to resist the first order, and were notified of the second application, but did not appear.

The complainant's practice was regular, and the order should be affirmed.

II.

The instalments of interest for which these orders of sale were respectively entered fell due and became payable, the *first* on the first day of September, 1866, and the *second* on the first day of March, 1867, and there is no provision in the mortgage requiring the complainant to wait sixty days after such default before applying for an order of sale.

The mortgage provides that in case of default for the space of sixty days after the interest or principal becomes due, the trustees may proceed under the power to sell, either at public or private sale, without the intervention of a court. We copy the provision at length:

"Second. In case default for the space of sixty days shall be made in the payment of any of said interest warrants, or coupons, as they respectively fall due, or if default for the like period shall be made in the payment, at maturity, of the principal sum of money mentioned in any of the said bonds, then, and in either of said cases, it shall be lawful, and said trustees are hereby authorized, in their discretion, either in person or by their attorney or attorneys, agent or agents, to enter into and upon, and take possession of, all and singular the railroads and all the other property, real and personal, hereinbefore conveyed, or intended to be conveyed, and to take and receive the income and profits thereof, and to sell all and singular said railroads and other property, with all the rights, liberties, privileges and franchises of said railroad company, in respect to said railroads from Milwaukee to Portage City, and from Watertown, by the way of Columbus, to Midland, either at public or private sale, and to execute and deliver to the purchaser or purchasers deeds and conveyances, which shall vest in said purchaser or purchasers all the estate, right, title and interest, whether legal or equitable, of said trustees and said railroad company of, in or to said property, rights, liberties, privileges and franchises, and every part and parcel thereof. But before any sale shall be made at auction notice of such intended sale shall be published once in each week for twelve weeks at least, in two newspapers published in the city of New York, and in a newspaper published in the city of Milwaukee; and should any further notice be required by the

laws of the state of Wisconsin the same shall be given. And in case the interest in default shall at any time be equal to the amount of the interest for one year on all the bonds then outstanding, or in case default shall be made in the payment of the principal sum of money mentioned in said bonds, or any of them, at maturity, then, and in either of said cases, said trustees, on the written request of the holder or holders of the major part in amount of the bonds then outstanding, shall proceed to make such sales and conveyances as are above mentioned.

Record 132 of 1863, p. 118, or record 279 of 1864, p. 53.

This provision has no application where the trustee forecloses by the aid of a court of chancery. It is not an extension of the time of payment, and if the mortgage is to be enforced by suit to obtain a decree of foreclosure, there is no requirement to wait sixty days, or any other time after the debt is due and payable, before commencing suit.

This clause authorizes the trustees, instead of proceeding in chancery, to proceed under the power and authority given in the mortgage, without the aid of any court, and at once to take possession of the mortgaged property, receive its revenue, tolls and income, and to sell it at either public or private sale, as they may deem advisable; but in that case they are to wait sixty days after default before exercising the power thereby conferred. But this limitation has no application when the proceedings are not under the power. It has no effect when the foreclosure is by suit in chancery. Hence the objection that the instalments of interest were not due when application for these orders was made has no foundation in fact.

III.

The application for these decretal orders was regular, and the orders properly granted. There was no error in the proceeding, and the orders should be affirmed

MILWAUKEE AND MINNESOTA RAILROAD COMPANY, APPELLANT,

vs.

FREDERICK P. JAMES, APPELLEE.

Nos. 231, 232 and 233.--December Term, 1867.

There are three appeals, all in the same cause and between the same parties, and the records are all contained in the same volume.

One of the appeals is from the final decree, Record 89 and 90, taken by Bright and Gunnison, in the name of the Minnesota company.

The second appeal is from the same decree, and is taken by the Minnesota company.

Record 101 and 102.

The third appeal is by the Milwankee and Minnesota company from the order confirming report of sale.

Record 102 and 103.

The bill of complaint was filed on the 18th day of April, 1866, by Frederick P. James, against the Milwaukee and Minnesota Railroad Company, and sets forth, in substance—

That on the 7th day of October, 1857, in the District Court of the United States for the District of Wisconsin, Newcomb Cleveland recovered against the La Crosse and Milwaukee Railroad Company a judgment for the sum of $111,727.71 damages, and $544.15 costs, which judgment was then and there duly entered and docketed. That said judgment had been assigned to said complainant, and that he is now the lawful holder and owner of said judgment, and that the same now remains in force and unsatisfied for the sum of $76,526.39

principal, and interest thereon from the 28th day of November, 1862, which sum is unpaid and justly due complainant. That at the time of the entry and docketing of said judgment said La Crosse Company owned and possessed a railroad and appurtenances, known as the La Crosse and Milwaukee railroad, extending from Milwaukee to La Crosse, in the District of Wisconsin, upon which railroad and appurtenances said judgment became and was a lien.

That subsequently and on the 21st day of June, 1848, said La Crosse company mortgaged said railroad and appurtenances to William Barnes in trust, to secure certain bonds.

That said Barnes foreclosed said mortgage by advertisement, and organized a new company under the laws of Wisconsin, and took the name of the Milwaukee and Minnesota Railroad Company, to which said Barnes, as purchaser under his said mortgage, conveyed said railroad with its rolling stock and appurtenances, and which said Minnesota company is now in possession and enjoyment of said railroad from Milwaukee to Portage.

That said Barnes' mortgage was fraudulent as to creditors, and that said Minnesota company holds said property in fraud of the rights of the just creditors of said La Crosse company.

That complainant's said judgment was subject to the lien of the land-grant mortgage given by the La Crosse company to Bronson, Soutter and Knapp, as to all that part of said railroad lying west of Portage; that said last named mortgage has been foreclosed, and the lien of said judgment extinguished as to that part of said railroad.

That in the latter part of the year 1857, or early part of 1858, said La Crosse company became insolvent and utterly worthless, and that it has now no property either in possession or expectancy; and that it has no officers or place of business, and has ceased to act or exist as a corporation.

That said judgment is a lien upon said railroad and its appurtenances from Milwaukee to Portage, and that he has no adequate remedy thereon at law, and can only obtain the fruit thereof by the interposition of this honorable court.

That said railroad and its appurtenances is encumbered by liens prior to said judgment, to Francis A. Palmer, City of Milwaukee, Bronson and Soutter, and Selah Chamberlain, to the amount of about three and a half million of dollars.

That said Minnesota company is utterly and wholly insolvent; that it has made a mortgage on said railroad for $600,000, which is junior to said judgment; that it is diverting the revenues to the payment of interest on that mortgage, but neglects to pay interest on said prior incumbrances, but fraudulently diverts the same, to the injury of said complainant.

That an execution was issued on said judgment in 1857, and levied on said railroad and appurtenances and returned to said court. That no sale was ever had, but that said levy still has all the force that it ever had or could have. The bill prays that said judgment may be decreed a lien as of its date; that a receiver of said road and property may be appointed, and that said road and its appurtenances may be sold, subject to prior liens, and said judgment paid out of the proceeds of said sale.

Record, pp. 1 to 4.

The Minnesota company answered said bill, admitting the recovery of the judgment and issuing of execution, but does not know amount due thereon. Denies that James owns it. Admits La Crosse company owned railroad as charged, but denies judgment was a lien thereon. Sets out giving Barnes mortgage, its foreclosure, formation of Minnesota company, and alleges it succeeded to all rights of the of La Crosse company. Denies that Barnes mortgage was fraudulent, and alleges organization of Minnesota regular and valid. Admits the mortgage to Bronson,

Soutter and Knapp a lien on western division of railroad prior to complainant's judgment, but denies that it has ever been foreclosed, because not legally confirmed, and that St. Paul company is a necessary party to this suit. Denies that said judgment is or ever was a lien upon said eastern division of said railroad, its appurtenances and fixtures. Admits said eastern division is encumbered with liens as follows: To Francis A. Palmer, $875,000; city of Milwaukee, $314,000; Bronson and Soutter, $1,000,000, and Scribner and Fonda, $600,000, and not encumbered with any other liens whatever, and *on information and belief denies that it is insolvent*, and denies that it is diverting revenues of road as charged.

That said eastern division for years prior to January, 1866, was in hands of receiver, and that defendant was compelled to pay $467,000 to prevent its being sold in January last, on claims prior to said judgment, and that there is a fund in court applicable to payment of interest on prior claims.

That James was a director of St. Paul, and that company refused to deliver rolling stock as it ought, to defendant; denies that any proceedings have been taken to make judgment a lien, on the said railroad and appurtenances and says that they are now owned by defendant free of said judgment, and sets up the proceedings of James in another suit (number 55 of this term) as a bar to any attack by James upon defendant's title underthe Barnes' mortgage, claims lease and judgment to Chamberlain fraudulent, and made to hinder and delay creditors and enable said La Crosse company to apply its means to the completion of its road. That Cleveland issued an execution and levied on certain lots of the La Crosse company not needed for its road, sufficient to pay it, and afterwards impleaded Chamberlain and others with said company and obtained a decree declaring said lots subject to his said judgment. That Chamberlain subsequently became the owner of said Cleveland judgment and released said lots and that said defendant had no lien thereon,

and that thereby said complainant is barred from enforcing said judgment against the property of this defendant. That Chamberlain received sufficient net revenues from the operation of said road to pay the Cleveland judgment. That Chamberlain received more than enough to pay this mortgage from the operation of said road. That he fraudulently made default in payment of interest on the Bronson and Soutter mortgage, and entered into a fraudulent arrangement for its foreclosure whereby defendant was compelled to pay $467,000 to prevent a sale of the property, and defendant claims that it is entitled to be subrogated to the rights of Soutter, survivor, &c., as to that amount in preference to said judgment.

Record, pp. 6 to 58.

The complainant filed a supplemental bill which was answered, but the matters therein contained related wholly to the application for a receiver, and are not material to the questions now at issue.

Record, pp. 59 to 65.

The decree declared said judgment a lien as of the 7th day of October, 1857, upon the interest of the La Crosse railroad company in said La Crosse and Milwaukee railroad, and that the sum of $98,801.51 was due thereon, that said La Crosse company had ceased to exist as a corporation, and that said Minnesota company had succeeded to its rights subject to the liens, charges and encumbrances thereon; specifies the liens prior to said judgment, and that the western division of said road had been sold, as alleged in said complaint, and directs a sale by the marshal of the road from Milwaukee to Portage, and its appurtenances to satisfy said decree.

Record, 67.

February 23d, 1867, a petition of the Minnesota was filed to stay sale, and open and vacate said decree, which, after hearing the parties, was denied.

Record, 69.

March 2d, 1867, Aaron S. Bright and Albert C. Gunnison, claiming to be stockholders, filed a petition setting up at great length the quarrels of the Minnesota company among themselves, and asking that the decree may be vacated, and that they may come in and defend said suit. Which was denied.

Record, pp. 71 to 89.

The marshal's report of sale is found on pages 94 to 96 of Record, and the order of confirmation on page 97. The proofs in the case are found commencing at page 105 of Record.

The complainant reproduced proofs showing the transfer of the said Cleveland judgment to him.

Record, pp. 105 to 109.

Also conveyances and agreements showing that the lots levied on by Cleveland, as stated in the answer, were released therefrom by Chamberlain, at the request of the Minnesota company, and by a mutual arrangement between the Minnesota and La Crosse companies.

Record, pp. 109 to 117.

The defendant's testimony was all documentary, and was admitted by stipulation, which is found in Record, pp. 133 to 135.

I.

The Cleveland judgment became a lien at the time it was docketed—on the 7th of October, 1857—upon all the right, title and interest which the said La Crosse and Milwaukee Railroad Company had, of, in and to the La Crosse and Milwaukee railroad, its rolling stock, franchises and appurtenances, subject to which were all suqsequent conveyances by that company.

The La Crosse and Milwaukee railroad company owned its road bed, depots, depot grounds, and all its appurtenances, in fee simple.

The charter of said company—Session Laws of 1852, page 332—says that said company may exercise the right of *eminent domain* in taking lands for the purposes of its road, "and on the payment of the compensation provided by said act to the party entitled to the same, *the title to said lands shall vest in the said company in fee simple.*"

The legislature of Wisconsin have expressly provided that "all rolling stock of any railroad company used and employed in connection with its railroad, shall be, and the same are hereby declared to be fixtures."

Session Laws of 1866, chap. 121, § 2.

Revised Statutes of Wisconsin, 511, § 34.

The federal courts have also uniformly held, that rolling stock is a fixture to a railroad, without or independent of a statute.

Pennock vs. Coe, 17 Howard, 117.

See also Palmer vs. Forbes, 23 Illinois, 300.

Hunt vs. Bullock, 23 Illinois, 320.

We therefore assume that, in Wisconsin at least, a railroad, including its road bed, depots, depot grounds, rolling stock, and all its appurtenances, is real estate. It is so treated in all the cases and in all elementary works.

If it is real estate, then it was subject to the lien of the Cleveland judgment by express provision of law. The Revised Statutes of Wisconsin of 1849, § 5 of chapter 102, provide that "All judgments hereafter rendered in any court of record shall bind and be a charge upon the lands, tenements, real estate, and chattels real, in every county where the record or a certified transcript thereof shall be filed, of every person against whom any such judgment shall be rendered, which such person may have in such counties at the time of docketing such judgment, or which such person shall acquire at any

time thereafter, and such estates and chattels real shall be subject to be sold on execution to be issued on such judgment."

The Revised Statutes of 1858, now in force, provide that "Judgments shall be a lien on the real property in the county where the same is docketed, of every person against whom such judgment shall be rendered, and which he may have at the time of docketing thereof in the county in which such real estate is situated, or which he shall acquire at any time thereafter for ten years from the time of docketing the same, in the county where it was rendered."

Revised Statutes, 758, § 36.

There is no exception from such lien of the real estate of a railroad company, and there is no reason why railroad real estate should not be subjected to the lien of judgments against the company the same as other property, but every reason why it should. The collection of debts from railroad companies is already environed with sufficient difficulty, without adding this disability. Railroad companies, as a general thing, own their roads in fee, the great majority of their property, depot grounds and other lands being acquired by purchase, and to exempt them from the lien of judgments, would be an unnecessary innovation of the law of lien, and deprive creditors of their just rights.

It has been contended that judgments are not liens upon railroads, for the reason that it is contrary to the policy of the law to allow railroads to be sold on executions at law, and it is insisted *that a judgment is a lien only where it can be enforced against the property by an execution.*

This proposition we deny. It is true that where the statute does not make judgments a lien upon real estate that the lien is a consequence of the right to issue an *elegit*, but such is not the case where judgments are made a lien by express provision of law.

At common law a judgment was not a lien upon land until the statute of Westminster (2—13 Edward I., C. 18,) gave the writ of elegit.

3 Blackstone Com., 418.

This writ subjected real estate to the payment of debts, and this, as a consequence, it has always been held, gave a lien on the lands of the judgment debtor.

Massinall *et al. vs.* Downs, 7 How., 765.

3 Salkeld, 212.

1 Wilson, 39.

The lien being the consequence of the writ of elegit, it followed that it could exist only while and where such writ could issue and be executed, as there was no law making judgments a lien.

Several of the states have not altered the English practice, and in such states there is no lien except what results from the right to issue an *elegit*. Such is the law in Virginia, and in the New England states judgments are not a lien until execution issues, and in Kentucky lands are only bound from the delivery of execution, the same as chattels.

4 Kent's Com., 435.

In Schaffer *vs.* Cadwallader (36 Penn., 128,) Mr. Wharton says: "There is not an act in this state which expressly or necessarily declares a judgment of itself to be a lien on lands; but the act of 1705 renders lands liable to execution in default of sufficient personal estate, and from this source the lien of judgment in Pennsylvania is derived."

Brightly, Purd, 462.

Chief Justice Lowry in that case says that there is no lien on the lands belonging to the municipality, because there is no way recognized by law in which it could be enforced, the courts being prohibited from collecting such judgment except by compelling the levying of a tax.

In United States *vs.* Morrison, (4 Peters, 136,) Chief Justice Marshall says: "There is no statute in Virginia which, in ex-

press terms, makes a judgment a lien upon the lands of the debtor. As in England, the lien is a consequence of a right to take out an *elegit*. During the existence of this right the lien is universally acknowledged."

But this doctrine has no application to this case, for the reason that in Wisconsin, as we have already seen, there is an express statute making judgments a lien upon lands, tenements, real estate and chattels real.

The statute of Wisconsin makes a judgment an express and absolute lien, independent of the process by which it may be enforced. Executions cannot issue in Wisconsin after five years without an application to the court or notice to the defendant; but this lien, provided by statute, remains in full force for ten years against all parties, regardless of whether an execution may ever issue upon it.

The supreme court of Wisconsin have construed this statute, and hold that the lien attaches for ten years, even when the process of execution is absolutely forbidden. They held that it attached to a homestead, which is exempt from forced sale on execution.

Hoyt *vs.* Howe, 3 Wisconsin, 752.

Johnson *vs.* Simmons, 14 Wisconsin, 527.

Hence we see that the English rule that the lien is the consequence of the right to issue an *elegit* does not prevail in Wisconsin, but that the lien attaches under their statute, notwithstanding that execution is denied.

An execution is not the only means by which a judgment lien can be enforced. As we have seen, the lien of the judgment under our statute is absolute, perfect, and independent of the means by which it is to be enforced. If for any reason the lien is not to be enforced by execution, the power of a court of equity may be invoked in aid of the judgment lien, especially is this appropriate when, from matters of state policy, or the general interests of the debtor, the aid of a court of chancery is necessary to prevent a sacrifice of his property.

The fact that the debtor requires such protection is no reason why the creditor should lose his lien. If it is necessary to invoke the equity powers of the court in order to protect their rights, instead of issuing the ordinary executions, such proceeding to enforce the lien of the judgment would be in the place of an execution, and the lien of the judgment would not be affected thereby, but would be protected and enforced.

II.

An execution at law is not an adequate or sufficient remedy to enforce the lien of a judgment against the lands and real estate of a railroad company, constituting its road bed and depots and the rolling stock and fixtures used on or in connection with its road.

The company owns the real estate over and upon which its road is constructed and depots erected, but they are comparatively valueless separated from the rights and franchises of the company to operate the road and receive income therefrom.

A judgment, under our laws, becomes a lien upon this property as real estate, and by the strict rule of law is subject to sale on execution as real estate, and in State vs. Rives, 5 Iredell, it was held that when a sale on execution had taken place that it transferred the real estate to the purchaser.

But it is well settled, however, that the franchises and rights of the company cannot be sold on execution unless authorized by statute.

Gue vs. Tide Water Canal Co., 24 How. 257.

State vs. Rives, 5 Iredell.

Seymour vs. Milford Turnpike Co., 10 Ohio, 476.

Hence a sale of the real estate and property of a railroad company on execution, if permitted, would separate the ownership of the property from the right or franchise to use it, which would render both nearly or quite useless and valueless.

The case of Gue vs. Tide Water Canal Company, 24 Howard, 237, holds "that the franchise of the company, or right to take toll on boats going through the canal would not pass to the purchaser under the execution."

The case further holds that to allow the real estate to be sold on execution would separate it from the franchise and destroy the property; that it would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders by dissevering from the franchise, property which was essential to its useful existence. A sale on execution was therefore enjoined.

The proceeding in the case of State vs. Rives was an indictment against Rives for tearing up the track of the railroad after he had purchased it on execution sale. No proceeding had been taken in equity or otherwise to enjoin the sale, but it was suffered to take place on the execution, and the indictment against him assumed to ignore the sale as wholly void. But the court held that if the sale was regular, inasmuch as it had taken place, it would have the legal effect of transferring the real property of the company so sold to the purchaser.

The question of the propriety or equity of allowing such a sale to take place was not before the court, but only the legal effect thereof after it had been suffered to take place.

It cannot therefore be considered as an authority authorizing a sale on execution, when the question of right to proceed is brought to the attention of a court of equity before the sale takes place, and if it could, it is overruled by the case of Gue vs. Tide Water Canal Co., in this court.

Gwynne's Law of Sheriffs and Coroners, 341.
2 Redfield, 544. Note and cases cited.

III.

The remedy at law being inadequate and inappropriate to enforce the lien of a judgment in such a case, a court of equity alone can afford the proper and requisite relief, and is the proper forum in which to obtain satisfaction of such judgment, where a sale of the whole property, including its franchises, will be ordered, for the payment of the debt.

In the case of Gue, above quoted, it was not necessary for the court to decide this question. The only matter presented in that case was whether a sale on execution would be allowed, which the court refused, and then say, "If the appellant has a right to enforce the sale of the whole property, including the franchise, his remedy is in a court of chancery, where the rights and priorities of all the creditors may be considered and protected, and the property of the corporation disposed of to the best advantage, for the benefit of all concerned.

This case clearly holds that we cannot proceed by execution at law, and that our only remedy is in equity—to have the whole property sold and the proceeds applied to the payment of the debts of the company.

Wherever there is a legal right and no adequate remedy at law, equity will furnish the remedy.

Therefore, in this case the complainant was entitled to seek the aid of a court of equity to enforce this judgment lien and obtain the fruits of his judgment. The usual course in such cases is for the court to appoint a receiver to take possession of the property, and to apply the income, rents, tolls or profits to the payment of the debt, provided said income, &c., will pay it within a reasonable time.

Covington Draw Bridge Company vs. Shepherd and others, 21 Howard, 112.

But where payment of a judgment cannot be attained at all by a mere application of the rents and profits, or where the payment cannot be obtained out of the rents and profits within a reasonable time, courts of equity will accelerate the payment by decreeing a sale of the property.

2 Story's Equity, §§ 1216 *a* and 1215 to 1220.

This doctrine has been sanctioned and approbated in this court in several cases.

United States vs. Morrison, 4 Peters, 124.

Benton vs. Smith *et al*, 13 Peters, 464.

See also the case of Tenant's Heirs vs. Patton, 6 Leigh, 196.

In this last case the debt was $820, and the annual value of the land was $400; yet the court accelerated the payment of the debt by decreeing a sale in equity.

The case of Macon and Western Railroad Company, 9 Georgia, 377, is a case where a court of equity entertained a bill for the sale of a railroad on several judgments, and decreed a sale and distributed the proceeds. The doctrine of this case was fully approved by this court in Covington Bridge vs. Shepherd *et al*, 21 Howard, 112.

In this case the debtor company became totally and hopelessly insolvent more than eight years prior to the commencement of this suit, and its successor, the present defendant, admits its inability to pay the interest on prior incumbrances out of the earnings of the road or otherwise, and denies its own insolvency only on information and belief, which is no denial of the fact.

It is evident, therefore, that there was no prospect that this judgment would ever be paid from the income of the road, as administered by the defendant, and it was therefore a proper case for a court of equity to accelerate payment by ordering a sale of the whole property.

The only remaining question is, could a court of equity direct a sale of the franchises of the company?

It is a matter of no consequence for us to inquire whether such a sale would transfer the franchises to exist as a corporation or to exercise the right of eminent domain in taking real estate or similar franchises. In fact we may admit, so far as the purposes of this suit are concerned, that they did not pass. The material inquiry is, did the franchise to operate the road and to receive the income and tolls, pass by the sale?

"The franchise to build, own and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing in, and being enjoyed by, natural persons, and there is nothing in their nature inconsistent with their being assignable."

Curtis' Opinion, 2 Redfield on Railways, 518.

The legislature of Wisconsin conferred these rights on the La Crosse company by its charter [Session Laws of 1852, chap. 325, sec. 8], and by the same section authorized them to sell or lease the railroad they were authorized to build. This no doubt authorized them to confer upon the purchaser all the franchises of which the company was possessed necessary to the beneficial use of said railroad.

Subsequently the legislature authorized said company "to mortgage its road by trust deed, and to authorize the trustee therein to enter into and upon, and to take possession of, have, use and employ, or to sell and dispose of the whole or any part of said railroad or estate, together with the functions appertaining to said railroad, and all corporate and other franchises, rights and privileges of said railroad company."

Private and local laws of 1856, chap. 78, sec. 1.

In the general laws of 1856, chap. 121, sec. 1, provision is made for all railroads to borrow money and pledge their "railroad track, right of way, depot grounds, rights, privileges, franchises, immunities, machine houses, rolling stock, furni-

ture, tools, implements, appendages and appurtenances belonging to or used in connection with such railroad or railroads, in any manner whatever," &c.

This provision was afterwards, in 1858, incorporated into the revised statutes of the state.

Revised Statutes, 510, sec. 33.

This La Crosse company, therefore, had the most full and ample power *voluntarily* to alienate its property and franchises of every description. The policy of the state was fully established in this particular. Their road and franchises were property, and if the legislature gave them full power and authority to voluntarily alienate it, as security for the company's debts, or in any other manner, there can be no objection to compelling the company to part with it, *in invitum*, in payment of the company's debts. To hold otherwise would enable the company, at its option, to hold its property in defiance of its creditors, and would be rank injustice. There can be no doubt of the right of a court of equity to direct a sale of this road, with its franchises, and the decree should be affirmed.

BILL.

THE MILWAUKEE AND MINNESOTA RAILWAY COMPANY, APPELLANTS,

vs.

SELAH CHAMBERLAIN AND MILWAUKEE AND ST. PAUL RAILWAY COMPANY, APPELLEES.

CROSS BILL.

THE MILWAUKEE AND ST. PAUL RAILWAY COMPANY, APPELLANT,

vs.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, APPELLEE.

Nos. 219 and 220 of December Term, 1867.

The original bill of complaint is found at page one of record, but it was subsequently amended by striking out the whole thereof except the address and description of parties, and a new bill substituted. The bill of complaint was filed against Chamberlain alone, and the St. Paul Company was subsequently made a party defendant.

The amended bill of complaint is found at page 65 of record and sets forth the existence of the La Crosse company, the making of the Barnes' mortgage sale of bonds, default in payment of interests, foreclosure and sale to Barnes, organization of the Minnesota company, and conveyance of mortgaged property to it, and that said Minnesota company thereby became the owner of said property subject to prior legal liens,

and that said Minnesota company is entitled to object, resist and set aside all conveyances, negotiations, sales, transfers and leases, mortgages or judgments, which were or have been made, or suffered by said La Crosse and Milwaukee railroad company with intent to hinder, delay or defraud its creditors, and all fraudulent claims against said La Crosse company, which are apparently liens on said property, and to collect and enforce all actions in favor of said company. That the La Crosse company on the 26th day of September, 1857, was greatly embarrassed and in failing circumstances, and was unable to pay its debts and prosecute the completion of its road, which was then only constructed from Milwaukee to New Lisbon, and said company with a view to hinder and delay its creditors made, or pretended to make a lease to said defendant Chamberlain, of its road and property, and put him in possession thereof. That said company had no legal right or competent authority to make and deliver said lease, and that the making and delivery thereof were acts beyond the corporate power of said company and void, and that it is void as to all creditors, and as to complainant, for the further reason that it was made with the intent and design of said company to hinder, delay and defraud its creditors, and particularly Vose, Livingston & Co., creditors of said company, and to prevent them from asserting their claim to certain railroad iron, which design of said company was well known to said Chamberlain when said lease was accepted by him, and he accepted the same with the view of aiding said company in said purpose.

That afterwards, on the 2d of October, 1857, said company with the same design confessed a judgment to said Chamberlain in the District Court of the United States for the sum of $629,089.72 and costs, which was duly confessed and docketed, but that said company was not then indebted to said Chamberlain and did not owe him any amount whatever, and that there was no consideration therefor, and that it was confessed by said company in pursuance of said fraudulent design, with

intent to hinder, delay and defraud the creditors of said company, and particularly said Vose, Livingston & Co., and to enable said company to apply the then future earnings of said railroad to the completion thereof, in defiance of the just claims and demands of the creditors of said company.

That until set aside, as hereinafter set forth, said lease and judgment did hinder and delay said creditors, and enabled Chamberlain to carry on and prosecute its said business for its own benefit and in defiance of its creditors; and that for these reasons said lease and judgment were ever void in law, without regard to the intent of the parties thereto.

That while said Chamberlain was in possession of said premises, one Newcomb Cleveland recovered a judgment against said company for $111,700.71 damages and costs, and issued execution and levied on the property described in and conveyed by said lease, and afterwards and on the 31st day of October, 1857, said Cleveland exhibited on the equity side of said district court his bill of complaint against said La Crosse and Milwaukee Railroad Company, Selah Chamberlain, and others, asking that said lease and judgment might be canceled and set aside, which bill was answered by said company and said Chamberlain, and a final decree rendered thereon, vacating and setting aside said lease and judgment. That said Chamberlain took an appeal to the supreme court, which was dismissed by the supreme court, February 1st, 1862, and that Chamberlain remained in possession of said leased property until May 18th, 1860, and in the receipt of the rents, revenues and tolls thereof.

That on the first day of September, 1859, $40,000 of interest became due and payable on the Bronson and Soutter mortgage, which was to have been paid by said Chamberlain out of the net revenues received under said lease; that Chamberlain at that time had in his hands moneys more than sufficient to pay the same, derived from the said lease, but that he neglected to pay the same, or any part thereof, and that afterwards

and on the 9th day of December, 1859, said Bronson and Soutter commenced a suit in the district court of the United States to foreclose said mortgage. And the further sum of $40,000 became due on the first of March, 1860, while said Chamberlain remained in possession as aforesaid.

That afterwards and on the 18th day of May, 1860, said Chamberlain having over $100,000 of the income of said road in his hands, voluntarily surrendered said leased premises to said Bronson and Soutter, as mortgagees, as aforesaid, and thereby voluntarily waived, abandoned and surrendered, all right or claim to the possession of said railroad, rolling stock and franchises described in said lease, and thereby estopped himself from setting up any claim under said lease. Nevertheless, said Chamberlain pretends that said lease and judgment are in full force, have not been canceled, and that he is entitled to take possession of said railroad and property under said lease. That said judgment still remains upon the records uncanceled, and that said lease is still in his possession and of record, and that said lease and judgment are a lien upon the rights of your orator, and enable said Chamberlain to pretend that they are encumbrances upon said railroad and appurtenances. The bill prays that Chamberlain may be enjoined from setting up any right or claim under said lease and judgment, and may be decreed to deliver up said lease, to be canceled and acknowledged satisfaction of said judgment, and for general relief.

On the 24th day of September, 1864, the defendant Chamberlain filed his answer, admitting the lease and his possession under it, denying that it was executed fraudulently, or to hinder or delay creditors, and alleging that the company had ample power to execute, and that it was executed to secure defendant for a just indebtedness for work, labor and services, and money and materials furnished in building and repairing said road. Denies that said La Crosse company was indebted to Vose, Livingston & Co., or that said lease was executed to defraud them. Admits the confession of judgment, and says

it was for a part of the indebtedness secured by said lease, and denies all fraudulent intent to hinder or delay or defraud creditors, as charged, and defendant says the answer of this defendant filed to the bill of Newcomb Cleveland, and attached to said bill of complaint, is true, and that as to all matters of detail he adopts it as his answer in this case. Admits Newcomb Cleveland recovered a judgment against La Crosse company, issued execution, and exhibited his bill of complaint, and obtained a decree thereon, as charged, but denies that complainant was a party thereto, or is in any manner affected or benefited thereby. Admits that he was in possession of said railroad and premises, May 18th, 1860, but denies that he voluntarily surrendered his possession, but says that he yielded it on demand, to a party having a prior right. Denies that he had in his hands any money applicable to payment of interest on the Bronson and Soutter mortgage, and said that he surrendered said road, protesting his right to have the property returned to him when the claim of said mortgage was satisfied. Defendant insists that said lease and judgment in his favor are valid and subsisting liens upon the said railroad against said complainants, and prior and superior to any claim it can assert. Sets up the decree dismissing complainants bill for the same identical matters of fact here set up, on the 29th day of June, 1863, in the circuit court, and claims it to be a bar to this action. Said bill so dismissed was appealed to the supreme court, and heard December term, 1865, as No. 151, and the decree affirmed by the supreme court, and is reported in 3 Wallace, 704.

Record, 117 to 119.

On the 17th of April, 1865, The Minnesota and St. Paul railway company had leave to intervene as a defendant in this cause, and file a cross bill.

Record, 121.

On the 23d day of May, 1865, the St. Paul company filed its answer, setting up, on information and belief, substantially

the same matters as are set up in the answer of Chamberlain, and further showing that prior to May, 1864, this said defendant, St. Paul company, became the owner of said lease and judgment, and has paid said Chamberlain full value therefor, that said judgment and lease are valid and subsisting liens against said La Crosse and Milwaukee railroad company, and liens on said railroad as against said complainant in this cause, and prior and superior to any lien or claim which it can assert. Sets up the former bill of the Minnesota company against said Chamberlain, which was dismissed as a bar to this suit, and claims the benefit of said decree, the same as though it had been plaintiff. That on the 9th of December, 1859, Bronson and Soutter brought suit to foreclose said second mortgage, and made said Chamberlain and said complainants in this cause defendants. That said Minnesota company answered in that suit the same matters set up in this suit. That a reference was had and a litigation in that suit between said Minnesota company and said Chamberlain of the same matters here set up, and that the masters to whom the same was referred reported the claim of Chamberlain under said lease and judgment free from fraud, and a valid and subsisting claim which was confirmed, and the defendant claims that said Minnesota company is now estopped to dispute the same.

Record, pp. 122 to 126.

On the same day the St. Paul company filed its cross-bill against said Minnesota company and Selah Chamberlain, setting forth the aforesaid indebtedness of said La Crosse company to said Selah Chamberlain, and the consideration thereof, the execution and delivery of said lease as security therefor, and the possession of Chamberlain under the same, and that said road was so far completed by said Chamberlain in November, 1858, that trains run through from Milwaukee to La Crosse, and that said Chamberlain continued to possess the same under said lease until May, 1860, when he surrendered the possession thereof as hereinafter particularly set forth.

That on the 2d day of October, 1857, in order further to secure said indebtedness, said company confessed a judgment to said Chamberlain for $629,089.71, which still remains in full force and unsatisfied.

That said Chamberlain realized no revenue from said railroad beyond a sum sufficient to pay a portion of the interest on the encumbrances mentioned in said lease. That he surrendered possession of said road to Bronson and Soutter on their demand on their mortgage, which was prior to said lease, and reserved his right to be reinstated in possession under his lease when the claim of said mortgage was satisfied; which surrender was in writing, and copies thereof attached.

That said lease was also subject to the land grant mortgage to Bronson, Soutter and Knapp on the western division of said road, from Portage to La Crosse; that a suit was commenced to foreclose that mortgage and a receiver appointed, and said portion of said road was sold under said mortgage.

That in the latter part of the year 1857, or beginning of 1858, said La Crosse company became insolvent and utterly worthless, and that it has now no property whatever, either in possession or expectancy.

That said St. Paul company is now the equitable owner of said lease and of the indebtedness thereby secured, and of the said judgment, and that it has paid to Chamberlain the full consideration therefor, and received from him an assignment of said lease and judgment, and that it so became the owner thereof prior to the month of May, 1864.

Said bill then sets forth the allegations of the principal suit, and also that there is now due on said judgment and lease the sum of $629,089.72, and interest thereon at twelve per cent. since October 2d, 1857. That said eastern division is largely encumbered by prior mortgages, which together with said judgment far exceeds its value, and that is in the hands of a receiver; that said contract or lease is in full force, and that it and said judgment constituted a lien upon said eastern division

of said railroad, and that your orator has no adequate remedy at law, and can only obtain the fruit thereof by the interposition of this honorable court. The bill prays that said lease or mortgage may be decreed to be a valid and specific lien or encumbrance upon the said eastern division of railroad, its appurtenances and franchises, and prior and superior to any right, interest or claim of the said Milwaukee and Minnesota railroad company; and that the amount equitably due thereon may be ascertained, and that it may be decreed to be sold, with its franchises and appurtenances, and the proceeds applied to the payment due to complainant; or that said judgment may be decreed a valid lien and subsisting security in favor of complainant, and that the same creates a lien on said railroad, appurtenances and franchises; and that said railroad, and its appurtenances and franchises, may be decreed to be sold to satisfy said judgment, and that a receiver may be appointed; or that the said eastern division may be delivered to said Chamberlain, to hold, use and operate the same under said lease.

Record, pp. 127 to 132.

The Minnesota company first demurred to said cross bill, and subsequently filed an answer denying the allegations of the cross bill, and the cause was heard on pleading and proofs.

Record, 140 to 142.

The complainant introduced the deposition of Hugh Lee, an engineer, who testified that he was employed in August, 1861, by the Minnesota company, to re measure the work done by Chamberlain on said road, and that he spent twenty-two days in that business. His testimony tended to show that the contract price paid Chamberlain was too high, and that more work was allowed to him than was performed. Chamlain's work was performed in 1856, 7 and 8, and this pretended measurement was in 1861.

Record, 148 to 173.

Selah Chamberlain was called by complainant, and testified to receipts of road while in his possession, and to amounts

paid on mortgages mentioned in his lease, and that his work was done upon contract with company.

Record, 174 to 177.

The Barnes foreclosure proceedings, articles of association of Minnesota company, and agreement with Bronson and Soutter as to foreclosure, were given in evidence.

Record, pp. 184 to 236.

A copy of the record of the case of Selah Chamberlain vs. Newcomb Cleveland, as printed in the supreme court, was introduced in evidence by complainant.

Record, pp. 237 to 470.

The record in the case of the Milwaukee and Minnesota railroad company against Selah Chamberlain, which was heard and decided in the supreme court at the December term, 1865, was read in evidence by the defendant.

Record, pp. 471 to 514.

On pages 235 and 6 of Record is a stipulation that the depositions contained in the record of the Cleveland case might be read in this case the same as if taken in this cause. The supplemental mortgage to Bronson, Soutter and Knapp was put in evidence.

Record, 368.

The contract with Vose, Livingston & Co. was given in evidence.

Record, 370 and 371.

The depositions taken in the case of Cleveland, which are stipulated as evidence in this cause, are contained in the Record from page 373 to 463.

These depositions show that the La Crosse and Milwaukee company were owing Selah Chamberlain $629,089.72, for which amount judgment was confessed October 2d, 1867. That Chamberlain had been importunate for security for several weeks, and that the company, on the 27th of September, 1857, had executed to him the lease in question as security. That Chamberlain's only object was to get security for the amount his due, but that the directors of the company insisted

on so arranging his security as to secure the building of the road. Some evidence was also taken tending to show that the amount of work done by Chamberlain was not as much as the chief engineer of the company had estimated.

George H. Daniels, Daniel L. Wells, A. S. Van Meenen, Foster C. Dodge, Wm. R. Sill, Robert Campbell were examined by Chamberlain in this cause. Some of them to show that it was impossible for Lee, at the time he attempted to measure the work, to ascertain what had been done, and others of them testified to the correctness of the original estimates.

The testimony of Mr. Chamberlain in his own behalf is found on pages 544 to 562 of Record.

The assignment of the lease to Chamberlain, and the judgment in his favor to the Milwankee and St. Paul railway company, were read in evidence.

Record, 541 to 543.

The bill of complaint of the Minnesota company in this case claims:

1st. That the La Crosse company had no power or authority to make the lease to Chamberlain.

2d. That it was made to defraud the creditors, and particularly Vose, Livingston & Co., and that the judgment was confessed with the same design, and that they are therefore void.

3d. That the Cleveland decree vacated them and set them aside as to all parties and for all purposes.

4th. That Chamberlain voluntarily surrendered his rights under the lease, and is now estopped to claim under it.

In answer we say:—

I.

That the La Crosse and Milwaukee Railroad Company were fully authorized and empowered to make and execute said lease.

By reference to section 8 of said original charter, (Laws of 1852, p. 329,) we find that full power was given the company to lease the whole or any part of its road in express terms—as follows:

"And they shall have power to connect the said railroad or branch railroad with any other railroad or branch railroad in this State, and operate the same in connection with such other railroad or branch railroad, and to lease or purchase from said other railroad company, the whole or any part of any railroad or branch railroad owned by such company, or *to lease* or to sell to any other company the whole or any part of the railroad or any of its branches to be built or owned by this company."

This provision gives full and ample power, and we need not look farther for authority to the company to execute a lease.

This instrument, although in form of a lease, is in fact a mortgage to secure the amount due Chamberlain, with a present right of possession and authority to receive the income, and in that view the company were fully authorized to make it.

Whether denominated a lease or a mortgage, it was in the nature of security for a debt, and corporations at common law were fully authorized to mortgage or pledge their property as security for their debts.

Angell and Ames on Corporations, § 191.

It can make no difference in what manner the pledge of the property is made, whether by mortgage, lease, or any other instrument; and while there may be some doubt as to the right of a railroad to transfer its franchise without the legislative authority, there is very little doubt that railroad companies possess the power to mortgage or pledge their property, in such a mode as to transfer the beneficial use of the franchise.

Redfield on Railways, 574.

But whatever the power of this railroad company might be at common law, the statutes of Wisconsin gave them ample

powers. Sec. 9 of the charter of the La Crosse and Milwaukee Railroad Company, session laws of Wisconsin for 1852, page 329, authorized the company to "*execute and deliver all such writings, bonds, mortgages, and other securities*, &c., as they may deem proper."

The act of March 4th, 1856, published in the volume of private and local laws of that year, at page 124, authorized it "to mortgage the whole or any part of its railroad, together with the functions appertaining to said railroad, and all corporate and other franchises, rights and priviles of said La Crosse and Milwaukee Railroad Company."

The act of October 10th, 1856, published in the general laws of that year, at page 212, authorized all railroad companies to make deeds of trust or mortgages to secure their indebtedness, and in and by such deed to pledge their property, real and personal, including their railroad with all its rights, privileges and franchises of every name and kind. Which last act is the same as the present Revised Statutes, page 510.

The counsel admits that by these acts the legislature had authorized said company to pledge its property, franchises and rights as security for its indebtedness, and had provided that on default the mortgagee or trustee might take possession of the road and its property, and operate the same; but he insists that it had not authorized a lease, and therefore that this conveyance was unauthorized. But the original charter, as we have seen above, authorized the company to execute and deliver all such *writings, bonds, mortgages and other securities*, as they might deem proper. This language was certainly broad enough to cover a lease, but, as we have seen above, it was also authorized in express terms.

The legislature had, by the acts above referred to, expressly authorized the transfer of all the franchises of the corporation. It thereby established the public policy of the State upon this subject. This question of authority to pledge the franchise of

the company, has only arisen where the legislature have made no provision on the subject—where they have not established the policy of the state. But having authorized the pledge or transfer of the corporate rights and franchises of the company as security for its indebtedness, it can make no difference whether such transfer is made by a trust deed, mortgage, or lease in the nature of a mortgage.

The appellant is not entitled to raise this question. It is a question which can only be raised by the State or the shareholders in the corporation. A creditor or other third person cannot question it.

Redfield on Railways, 575 to 591.

II.

The bill of complaint alleges that this lease was executed, and judgment confessed, in fraud of the rights of creditors, and with the intent and design to hinder, delay and defraud creditors in the collection of their debts. Granting that to be so, still no one but a creditor of the La Crosse and Milwaukee railroad company, who has established his character as such, by obtaining a judgment against said company, is entitled to attack or set them aside on that ground. As to all the rest of the world they are valid and binding.

In this case there is no proof of the existence of a creditor of the La Crosse company of any description, much less of a judgment creditor. It does appear that Cleveland was once a judgment creditor of said company, but this record shows that his judgment had passed into the hands of Chamberlain, and was no longer in hostility to this judgment and lease.

But the Minnesota company is here the attacking party, and its attack must succeed or fail on its own basis and character

alone. That company is not a creditor of the La Crosse and Milwaukee railroad company, and for that reason is not entitled to attack Chamberlain's lease and judgment as fraudulent against creditors. It stands in the place of the La Crosse company, and can no more attack this lease and judgment than the La Crose company could. It has succeeded to the rights of the La Crosse company—nothing more.

The Minnesota company has no demand of any kind against the La Crosse compony. The latter is not its debtor to any amount whatever. But said Minnesota company is a mere purchaser of the estate of the La Crosse company, subject to all liens prior to the Barnes mortgage, and is not entitled to the rights and remedies of a creditor in such case.

But if we were to admit it a creditor, still it is not a judgment creditor, and none but judgment creditors are entitled to attack a conveyance as fraudulent as to creditors.

In Hastings et al. vs. Belknap et al., 1 Denio, 190, Justice Jewett says, on page 188: "The assignment was valid as between the parties to it, and could not be impeached except by a *judgment* creditor, even if it was fraudulent as to creditors." And denied the right to a landlord, who was seeking to defend the taking of certain goods on a distress warrant, to attack an assignment as fraudulent. See also,

Frisley vs. Thayer, 25 Wendell, 369.

In Reubens vs. Joel, 13 New York, 488, the court says: "Prior to the code it was the settled law that a creditor could not restrain or question the disposition of his debtor's property until he had completed his title at law, by judgment and execution," and that case holds the same doctrine under the code.

Simple contract creditors, or creditors at large, without a judgment, have no such right. It is only after they have established their standing as creditors, by obtaining a judgment, that they are allowed to attack or set aside conveyances of their debtors alleged to be fraudulent.

A creditor who is prosecuting his suit, and with an attachment issued and levied, cannot attack a conveyance as fraudu-

lent as to creditors in order to set it aside until he has obtained judgment.

Hall vs. Stryker, 29 Barbour, 105.

Jones et al. vs. Lake, 2 Wisconsin, 210.

Eaton vs. McCarty, 2 Wisconsin, 282.

If the Minnesota company was now a creditor, still it would have no right to attack this lease for the reason that none but creditors at the time could object to it. Subsequent creditors would not have that right.

Bodley et al. vs. Goodrich, 7 Howard, 276.

2d. Neither Barnes or the Minnesota company organized by him are to be regarded as purchasers at a judgment or execution sale. His sale was only by virtue of the power given him by the La Crosse company. Purchasers at judicial sales are to some extent invested with the rights of judgment creditors, and entitled to enforce them as against fraudulent conveyances the same as judgment creditors. But it is only as possessing the rights of a judgment creditor that it can be done. Barnes does not now, and never did, possess any such right. He was by virtue of his mortgage a purchaser from that company; and his sale to himself, without the intervention of the judgment or decree of the court did not change his character; he was still simply a purchaser, and the Minnesota company organized by him could claim no other rights than those possessed by Barnes. This company, therefore, is simply a purchaser of the La Crosse company, and not a creditor of it.

The Minnesota company, as successor and assignee of the La Crosse company, possesses no rights as creditor. The La Crosse company possessed no power to set aside this lease and judgment as fraudulent against creditors, and the Minnesota company taking from the La Crosse company through Barnes as a purchaser only of such rights as the La Crosse company had. Its condition is that of its assignor or vendor; therefore the Minnesota company, as the assignee of, or purchaser from, the La Crosse company, cannot attack this lease and judgment

as fraudulent against creditors. It is not a creditor of that company, and its condition as a purchaser from it, through the Barnes mortgage, does not give it the rights or privileges of a creditor for any purpose. The La Crosse company could sell, assign or transfer to the Minnesota company only such rights as it possessed. It could not transfer to the Minnesota company the right to prosecute this suit, even had the La Crosse company had such right.

Milwaukee and Minnesota railroad company vs. Milwaukee and Western railroad company, 20 Wisconsin 174.

Prosser vs. Edwards, 1 Young and Coll. 481.

Therefore we insist that the Minnesota company cannot maintain this action as a creditor of the La Crosse company.

As a purchaser from the mortgagor subsequent to Chamberlain's lease and judgments, the Minnesota company cannot maintain this bill to set aside and vacate said lease and judgment.

1st. The bill shows that neither Barnes or the Minnesota company were purchasers for a valuable consideration, without notice of this lease and judgment.

2d. There is no allegation in the bill that the lease and judgment were made or confessed to defraud purchasers.

The bill shows that Chamberlain was in the actual and exclusive possession of said road from the 26th day of September, 1857, until the 18th of May, 1860. That his possession commenced nine months before the giving of the Barnes mortgage, and continued for one year after the organization of the Minnesota company. This was full and complete notice to all parties of his rights. With such notice the complainant Barnes, or Minnesota company, was not a bona fide purchaser and entitled to the protection of the statute. Constructive notice was sufficient.

3d. The allegation of the bill that the lease was made, and judgment confessed, with intent to hinder, delay and defraud creditors, will not support it as intended to defraud purchasers.

"Although a deed of conveyance of land may be fraudulent and void as to creditors, yet none but creditors can take advantage of the fraud. A subsequent purchaser, with notice of such prior conveyance, is concluded by it."

Foster vs. Walton, 5 Watts, 368.

Lancaster vs. Dolan, 1 Rawle, 281.

A deed made to defraud creditors is only void as against creditors, but valid as to subsequent purchasers.

Douglass vs. Dunlap, 10 Ohio, 162.

Bank of Alexandria vs. Patton, 1 Robinson, Virginia, 538.

In Sanger vs. Eastwood, 19 Wendell, 514, Chief Justice Nelson says: "But then it must be a fraud that the purchaser may take advantage of himself. It might have been intended to defraud *creditors*, but that is a question solely between the *creditors* and the *mortgagee*. Proof of such a fact, as observed by Mr. Roberts, ought rather to prejudice than advance the claims of a purchaser."

One who purchases with notice of a prior fraudulent conveyance, though for a valuable consideration, is not protected.

Shaw et al. vs. Levy, 17 Serg't and Rawle, 99-102.

Rogers vs. Evans, 3 Indiana, 574.

A subsequent purchaser, for valuable consideration with notice, cannot impeach a prior conveyance, as without consideration, and fraudulent and collusive between the parties.

Robinson vs. Martel, 11 Texas, 149.

Fowler vs. Stoneman, 11 Texas, 478.

Hubble vs. Brockwell, 3 Sneed, 574.

A voluntary conveyance recorded under the registry act, will not be defeated by a subsequent conveyance to a purchaser for a valuable consideration, notwithstanding the original grantor remains in possession, until the subsequent conveyance is made.

Cooke vs. Kell, 13 Maryland, R.

The bill of complaint in this case alleges that this lease and judgment were fraudulent as to creditors, and further that the

complainant, the Minnesota company, is a subsequent purchaser with full notice, but is not a creditor of the La Crosse company. These allegations are insufficient to sustain the bill to set aside said lease and judgment, for the reason, that it is not alleged that said lease and judgment were made to defraud subsequent purchasers, or were fraudulent as to such purchasers, and because it appears said subsequent purchasers had full notice of said lease and judgment, and the alleged fraud as to creditors does not affect the rights or remedies of subsequent purchasers.

The sole ground upon which the Cleveland decree was made, was that the company were endeavoring by the arrangement with Chamberlain, to secure the completion of the road to La Crosse, and seeking to apply their means to that purpose, instead of applying them in payment of their debts. At that time only about 130 miles of the road was built, and 70 miles more were required to reach the Mississippi at La Crosse. These seventy miles were completed by Chamberlain to La Crosse within one year from the making the lease, and while he was in the possession of the road. The Barnes mortgage was not executed until shortly before the completion of the road by Chamberlain. The first of the Barnes mortgages, bearing date June 21st, 1858, and the supplemental mortgage on August 11th, 1858, only about two months before the final completion of the road, and none of the bonds of the Barnes mortgage were issued until after that time. This Barnes mortgage covered not only the 130 miles of road built when the Chamberlain lease was made, but, also, that which was built by Chamberlain subsequently. And the present attempt of the Minnesota Company is to deprive Chamberlain of his lien for the amount his due when his lease was made, after having had, under the Barnes mortgage, the full benefit of the road completed by Chamberlain. A moment's consideration of these facts will show the great injustice of this attempt of the Minnesota company to set

aside Chamberlain's lien on any of the grounds set forth. If it was fraudulent as to the existing creditors, it matters not to this company. It was not a creditor, and therefore not defrauded, and as a subsequent purchaser under the Barnes mortgage, it has had the benefit of this arrangement, of the trusts which the bill alleges were created in favor of the La Crosse company by the Chamberlain lease, and should not now be heard to question its validity.

Besides, our statute provides that "no conveyance or charge shall be deemed fraudulent in favor of a subsequent purchaser who shall have actual or legal notice thereof at the time of his purchase, unless it shall appear that the grantee in such conveyance, or person to be benefited by such charge, was privy to the fraud intended."

Here there is no pretence—1st, that anything was ever done with intent to defraud a subsequent purchaser; or, 2d, that Chamberlain ever had any knowledge of, or was privy to, any such intended fraud. How, then, can it be claimed that said lease and judgment were fraudulent as to creditors?

III.

There was no fraud in fact in Chamberlain's lease and judgment, but they were a security for a *bona fide* debt to him, and he had no intention to defraud either creditors or purchasers.

The claim is that said lease and judgment were void because some of the directors were influenced in giving them by a desire to protect the company.

The evidence shows conclusively that Chamberlain's only motive was to acquire security. He had applied and been pressing for it for a long time previous.

Chamberlain's testimony, Record, p. 555 *et seq.*
B. Kilbourn, Record, p. 380 *et seq.*
Charles E. Jenkins, Record, p. 383.
Hugh McFarlin, Record, p. 394.

The motives of the president and directors of the company, even if fraudulent, so long as Chamberlain did not participate in them, did not affect Chamberlain's security for a *bona fide* debt.

Marbury vs. Brooks, 7 Wheaton, 556.
Brooks vs. Marbury, 11 Wheaton, 78.
Tompkins vs. Wheeler, 16 Peters, 106.
Maguiar vs. Thompson, 7 Peters, 392.

This was not an assignment to a trustee, but a security to the party himself, and was not liable to the objection made in the case of Bodly vs. Goodrich, 7 Howard, 276. The property could have been released from Chamberlain at any time, on payment of his debt.

Leitch vs. Hollister, 4 Com., 211–216.
Dawes vs. Kissam, 10 Howard, 102.

Chamberlain's demand was contracted in good faith, and was actually subsisting at the time of the execution of the mortgage or lease and confession of judgment.

See Chamberlain's deposition, 542 to 562.
Kilbourn's deposition, 373.
C. E. Jenkins' deposition, 383.
E. W. Woodward's deposition, 456 to 463.
John McLean Stoughton's deposition, 423 to 433.
Wm. R. Lill's deposition, 433 to 447.
And Exhibits, Record, p. 447 to 457.
See also testimony of Goodrich, Kneeland and McFarlane.

B. H. Edgerton, Thomas Peverly, and Hugh Lee were examined with a view to show that more work had been estimated to Chamberlain than he had performed, and that higher prices than the work was worth.

Edgerton's deposition, Record, pp. 382, 394 and 397.

Peverly's deposition, 389 to 394.

Lee's deposition, 148 to 172.

In contradiction of the above testimony, I refer to testimony of Woodward and Sill, before cited, and the depositions of—

I. C. Brewer, Record, 423.

C. S. Gregg, Record, 413.

Thomas Daniel, Record, 414.

D. J. Whittemore, Record, 417.

See also, in regard to Lee's depositions, the depositions of—

G. H. Daniels, Record, 315 to 516.

D. L. Wells, Record, 517.

A. S. Van Meenen, Record, 518 to 520.

Foster C. Dodge, Record, 520 to 522.

William R. Sill, Record, 523 to 531.

Robert Campbell, Record, 531 to 541.

The weight of testimony is overwhelming in favor of the correctness of the estimates upon which the claim of Chamberlain is based, as to the amount of work done.

The testimony of Peverly, Edgerton and Lee, as to the prices paid for the work, is entirely irrelevant. The parties were governed by the original contracts, as to which no fraud is alleged. There is no issue on that subject.

The provisions in Chamberlain's lease relative to the completion of the road to New Lisbon, the addition, from time to time, of new rolling stock, if necessary, and the continuance of the traffic of the road, were not fraudulent as to subsequent creditors or purchasers, however they might be regarded as to the rights of then existing creditors. This Chamberlain lease

was, in fact, a mortgage, and Chamberlain must be regarded as a mortgagee in possession.

Hughs vs. Edwards, 9 Wheaton, 489.

Nugent vs. Riley, 1 Metcalf, 117.

The lease provides for nothing which a mortgagee might not do and would even be bound to do; and if the parties contracted to have done nothing more than the mortgagee could have done in the absence of any agreement, the authority to do it cannot be regarded as evidence of fraud, even against existing creditors, much less against subsequent creditors or purchasers. We therefore insist that there was no fraud in the lease or judgment to Chamberlain in any manner affecting his rights as against subsequent creditors or purchasers. And the only pretence that was ever set up that it was fraudulent in any respect was that it attempted to provide for the completion of the road to New Lisbon, to which point it was almost completed, the expense of doing which was only about $56,000, which it was insisted was a fraud in law as to the then existing creditors, without regard to the actual intent of the parties.

Record, 582 and 583.

Whether such a position can be maintained under the provisions of our statute (sec. 4 of chapter 77 of Revised Statutes of 1849), which provides that the question of fraudulent intent shall be a question of fact, it is not necessary now to discuss, inasmuch as our rights are not impeached by a creditor of the La Crosse company, either then existing or subsequent thereto.

2d. Chamberlain's judgment was confessed for the exact amount ascertained to be his due on his contract, according to the estimate returned by the chief engineer of the company.

Deposition of H. L. Palmer, Record, pp. 582 to 585.

See also deposition of Kilbourn, above referred to.

There is no ground whatever, therefore, for questioning the judgment, and it is a valid and subsisting lien upon all the

property which belonged to the La Crosse company at the time, and now claimed by the Minnesota company.

IV.

The decree in the case of Newcomb Cleveland against the La Crosse and Milwaukee railroad company and Selah Chamberlain, in the district court of the United States for the district of Wisconsin, has no effect upon the validity and force of this lease and judgment between these parties, and we are not bound by that decree.

This question was directly in issue in the case decided by this court at the December term, 1865, and requires no further argument at this time.

Minnesota company vs. Chamberlain, 3 Wallace, 704.

V.

The Milwaukee and Minnesota company filed its bill in the circuit court, June 23d, 1863, against the defendant Chamberlain, setting up the same matters of fact here set up, and praying certain relief, which was demurred to by Chamberlain, and the demurrer sustained and bill dismissed It is submitted that that proceeding is a bar to this suit.

The record of the case above referred to is found in the record of this case, pp. 471 to 514.

The decree in that case was affirmed by this court, December term, 1865.

Minnesota company vs. Chamberlain, 3 Wallace, 704.

VI.

Chamberlain did not voluntarily abandon and surrender his lease and all right and claim to the possession of said railroad,

rolling stock, franchises and other things mentioned and described in said lease, but yielded to the demand of Bronson and Soutter for the possession of the eastern division, under their mortgage, as he was bound to do, but protesting and reserving his right to be restored to the possession under his said lease whenever the claim of Bronson and Soutter, under their mortgage, should be satisfied. The western division was surrendered to Hans Crocker, receiver under the order of the court.

See written demand of Bronson and Soutter, and Chamberlain's answer, Record, pp. 119 and 120.

The Bronson and Soutter mortgage was a lien on the east division prior and superior to Chamberlain's lease, and on default of the payment of interest on that mortgage for sixty days they were entitled to the possession of the mortgaged premises; and it was the duty of Chamberlain to surrender to them on demand; and such surrender was no abandonment of his lease, or of his rights and privileges under it as to the La Crosse or Minnesota company, or any other party whose rights were subject and inferior to the rights of Chamberlain under the lease.

But it is said that Chamberlain fraudulently made default in the payment of interest on the Bronson and Soutter mortgage, in order that a foreclosure might take place. This charge is denied in the answer, and no proof was offered to sustain it. The lease and simultaneous contract [Record, 37 to 43] provides the manner in which the income of the road was to be applied, and it is claimed that Chamberlain abandoned his lease, because he failed to pay the interest on the mortgage which the lease provided he should do.

His lease required him to pay the interest out of the net income of the road.

The contract executed on the same day required Chamberlain to credit said company on the first day of July, 1858, and

on the first days of July and January thereafter with such amount as might be in his hands, from said net earnings on said days, and render the company a statement of account.

Such application was made on the first day of January, 1859. From that time to the first day of September 1859, a period of eight months. When default occurred in the payment of interest on this mortgage the total net earnings of the entire road from Milwaukee to La Crosse was only $63,175.62. As appears by the master's report. Record 132 of 1863, p. 398.

The total disbursements by Chamberlain during the same time from the net earnings.

For right of way and graveling, amounted to	$16,405 23
And for interest on mortgages paid	88,424 25
Making his total disbursement for same time	$104,829 48

As appears by the report of the master's schedule 4, said record 132, page 322 and 323, thus showing that Chamberlin was compelled to advance from his own funds during said eight months $41,653.86 in order to meet the interest required to be paid by the lease.

On the first of September the interest on the second and city mortgages fell due, amounting to over $50,000, and on the first of November following the intent on the Palmer mortgage and sinking fund amounting to $50,000more.

It was under such circumstances that default was made in the payment of the interest on this mortgage, which the counsel insist was fraudulent, an abandonment of his lease and that thereby all his rights under it were forfeited and done with a view and purpose of procuring a foreclosure of this mortgage. Any one slightly skilled in finance will readily discover a different reason, and ample cause, for the failure to pay this interest, and it is most earnestly claimed that such failure did not forfeit Chamberlain's rights under said lease, but that whenever the interest on the Bronson & Soutter mortgage is paid that he is entitled to be restored to the possession of this road under said lease.

VII.

The cross bill of the Milwaukee and St. Paul railway was the appropriate remedy to enforce the payment of said Chamberlain judgment, and to enforce said lease as a security for said debt, and the circuit court had jurisdiction for that purpose.

The bill of the Minnesota company was filed to cancel and set aside said lease and judgment. Their legality and validity as existing securities and liens upon said railroad property, was directly put in issue thereby, and in order to defend against said suit their legality and sufficiency had to be established, that being established, the Milwaukee and St. Paul railway company, the owner thereof, was entitled to have them enforced so as to get the fruits thereof; the cross bill therefore was proper, as a defence, and asking affirmative relief in order that the whole matter might be disposed of in one suit.

See authorities on page 44 and 45 of this brief.

On a bill filed for specific performance of an agreement, a cross bill is proper to have the agreement cancelled.

2 Maddock, Ch'y 430 and 31.

Where a bill was filed to be relieved against a deed and a cross bill filed by defendant to establish the deed, it was sustained as proper practice.

A bill filed to set aside and cancel a mortgage and a cross bill to foreclose it is common practice.

It is therefore assumed that a cross bill in this case was proper practice. The decree in this case, record 143, dismisses the cross bill without prejudice, for the reason that said companies were not competent to litigate the matters of the cross bill in the United States court, on account of their citizenship, and it dismisses the principal suit as to the lease without prejudice, for the same reason as the St. Paul company had become the owner thereof before the filing of the bill of the Minnesota

company, and was a necessary party, but said principal suit as to the judgment, is dismissed on the merits.

We submit that the decision in the cross suits is erroneous.

Chamberlain had a debt against the La Crosse and Milwaukee railroad company, which was unliquidated, and to secure which the La Crosse company gave the mortgage lease. Afterwards said debt was liquidated, and ascertained to be $629,089.72, for which amount judgment was rendered in the district court of the United States for the district of Wisconsin. The account of Chamberlain, or debt for the security of which this mortgage lease was given, so far as it formed the consideration of the judgment, at once merged in this judgment, from which time the lease stood as a security for that judgment, which was the only evidence then remaining of that part of said indebtedness for the security of which said mortgage lease was given. This judgment and said lease, so far as it stands as a security for the judgment, is assigned for value to the Milwaukee and St. Paul railway company. That company becomes the owner of said judgment, with all the collaterals that secure it, and files its bill in the circuit court to have this judgment enforced, and that court solemnly adjudicates that it has not the authority to enforce its own judgment, and that the owner thereof must seek his remedy on that judgment in the State tribunals. It cannot be that the circuit court fully understood what it was deciding when it dismissed said cross-bill. The decree amounts to a denial of all remedy upon the judgment. The State courts cannot entertain a bill to enforce it.

All suits in the nature of creditors' bills to enforce judgments, are in their nature ancillary and supplemental to the original suit, and may be maintained without regard to citizenship—the jurisdiction having properly attached in the principal suit.

Minnesota Co. vs. St. Paul Co., 2 Wallace, 609.

Clark vs. Mathewson, 12 Peters, 164.

Freeman vs. Howe, 24 Howard, 450.
Dunn *et al* vs. Clark, 8 Peters, 1.
Molan vs. Torrance, 9 Wheaton, 537.
Hatch vs. Dorr & Kendrick, 4 McLean, 112.
Dunlap vs. Stetson, 4 Mason, 360.
Logan vs. Patrick, 5 Chranch. 288.

The lease, so far as it is a security to this judgment, could be enforced in any suit where the judgment could be enforced.

But whatever may be the opinion of the court in regard to enforcing the lease, we are entitled to have the judgment enforced, and the remedy on the judgment would be a sale of of all the property of the La Crosse company upon which it became a lien on the 2d day of October, 1857, under the order of the court.

The same relief that was granted in the case of James, is the remedy sought upon this judgment, and we refer the court to our brief in that case, on pages above.

No. 263, December Term, 1867.

FRANCIS VOSE, APPELLANT,

vs.

JAMES T. SOUTTER AND SHEPHERD KNAPP, SURVIVORS, &c., OF GREENE C. BRONSON, TRUSTEES, AND OTHERS, APPELLEES.

The bill of complaint in this cause was filed in the circuit court on the 27th day of September, 1862, by Francis Vose, against all the parties, complainants and defendants, in the land-grant foreclosure suit. That foreclosure suit was commenced December 5th, 1859, and a final decree of foreclosure and sale made therein January 13th, 1862; and at the time this bill was filed the mortgaged premises were being advertised for sale by the marshal.

The bill of complaint sets forth that on the 3d day of December, 1856, before the execution of the land-grant mortgage, Vose, Livingston & Co., to whose rights he had succeeded, as assignee, entered into a contract with the La Crosse and Milwaukee railroad company to sell to said company 11,000 tons of railroad iron, and to be paid for in land-grant bonds, then about to be made, at eighty cents on the dollar, with an understanding that said *Vose, Livingston & Co. were to be entitled to any reduction or advantage, if any, to the subscribers or purchasers of the balance of* $2,500,000 *of said land-grant bonds to be made in* 1857, said iron to be paid for from time to time on receipt of bills of lading. That only $2,500,000 should be issued in 1857, and the iron purchased to be used in constructing the road from Portage to La Crosse, and for no other purpose. That the iron was furnished and paid for in bonds in 1857, at eighty cents on the dollar, and the bonds so received amounted to over $700,000 at par. That the land-grant mortgage was executed in December,

1856, to Bronson, Soutter and Knapp, for ten millions of dollars. That in January, 1858, a further deed was executed, by which the amount of bonds to be issued under said mortgage, which was to be a lien on the road from Portage City to La Crosse, should not exceed $4,000,000. That said company issued $2,500,000, including those issued to Vose before the making of said second deed of trust, and that they afterwards issued $1,500,000 more of said bonds.

That Vose, Livingston & Co. were merchants, and had to dispose of bonds, and for that reason it was stipulated that they should have them at the lowest price at which they were sold that year.

That said company sold large amounts of said bonds in 1857 at less than eighty cents on the dollar, and sold him five hundred and nine of said bonds, numbered from 1992 to 2,500 inclusive, at forty cents on the dollar.

That Vose & Co. continued the owners of a large amount of said bonds during 1857 and afterwards, and in consequence of the sale of said bonds at forty cents they were compelled to sell at that price, and that if the company had not sold at less than eighty cents they would have been able to have sold at a fair profit, and that in consequence of the premises they are entitled to receive about $714,000 in said bonds, in addition to what they did receive. That the iron sold was worth the price paid, and was used in laying the track from Portage to La Crosse, and no other iron was used for that purpose. That said La Crosse company is now, and since 1857 has been, utterly insolvent, and has been sold out on the Barnes mortgage, and the Minnesota company formed, and that an action at law against said company, if it could be sustained, would be nugatory, and the complainant is remediless except by this proceeding. The bill sets forth the proceedings in the land-grant foreclosure suit, and claims that the property is ample to pay the amount of decree and the amount claimed by the complainant. That a portion of the bonds were cut down in consequence of their having been sold at a discount.

That although complainant has not received the additional amount of bonds, he is advised he is entitled to share in the disposition of the proceeds of sale, the same as though he had received them, and that in consequence of the cutting down of a portion of said bonds to forty cents on the dollar there is an unappropriated lien in said mortgage liable to be applied in liquidation of said complainants said claim. That said trustees, Bronson, Soutter & Knapp, and all the defendants to said suit, knew of said complainant's claim, and that he ought to have been made a party so as to enable him to set it up, or that said Bronson, Soutter and Knapp should have set up said complainants' claim, and that as they did not do so it is not barred or foreclosed, and that the decree ought now to be modified. The bill then prays that the La Crosse company may be directed to issue to said complainants $714,000 of said bonds, and that said Bronson, Soutter and Knapp may be directed to countersign them, or that in the distribution of the proceeds of sale said complainant may receive therefrom a *pro rata* proportion thereof, the same as if such bonds had been issued.

Bronson, Soutter and Knapp demurred to said bill, and the demurrer was sustained and the bill dismissed.

I.

The decree of the court below should be affirmed.

That the bill is novel and exhibits great fertility of genius is admitted, but the legal and equitable grounds upon which it is to be sustained are not apparent.

The defendants, Bronson, Soutter and Knapp, the trustees, had no power or authority to enlarge said mortgage, or to consent to or aid in its enlargement, or to issue any additional bonds under it. All the bondholders under said mortgage would be directly and injuriously affected by any such proceeding. The mortgage, as finally amended and limited, pro-

vides for the issue of four million of bonds under it on these premises, and no more. That amount of bonds were issued and became liens on said road. The rights of those bondholders thereby became fixed, and no outside equities between the La Crosse company and any third person could be allowed to affect the relations or interests of said bondholders. No additional bonds could be issued. It might possibly be that some one might have an outside equity that would take precedence of said bonds, but that such an equity could, by any means, be injected into said mortgage so as to stand on a par with said bondholders, either by increasing said mortgage or the amount secured by it, or diminishing the interest of the bondholders *pro rata* or otherwise, so as to make room for the new comer, is a position so new and startling that it shocks our staid notions of law and the rights of parties under solemn deeds, and I am satisfied could never have had a place in a less brilliant and fervid imagination than that of the counsel opposed.

The fact that the court in making its final decree, either rightfully or otherwise, razeed a portion of the bonds, does not alter the case. The mortgage was given to secure four millions of bonds only, and whatever amount might be found due on those four millions was the amount secured, and no more.

2d. The bill could not be sustained against the La Crosse company, even, and much less against the trustees and bondholders.

The iron was delivered and the bonds received in payment, according to the contract. The contract was fully executed, and could not afterwards be opened. The agreement was to sell a quantity of iron at a given price, and to take these bonds at eighty cents on the dollar in payment, with a further agreement that the seller was to have the benefit of a lower price for said bonds, if said bonds were sold at a lower price to the subscribers therefor. The iron was delivered and

bonds received at the price stipulated. No bonds were sold at a lower price until this transaction was closed, but subsequently some were sold at a lower price, and it is now claimed that additional bonds must be issued to the complainant, or, in other words, that the bonds which he accepted at eighty cents are now to be considered as received at forty, and an additional and equal quantity to be issued to him at that price. Such is not the fair interpretation of the contract, and all that could be claimed under it would be that whenever a payment was to be made under it, the parties might inquire, Have you sold these bonds at less than eighty cents? If so, payment must be made at the reduced rate, whatever it might be; but when once payment was made and the bonds received, the matter was closed, and it was not subject to be re-opened by any subsequent reduction in the price of said bonds.

The complaint, therefore, discloses no cause of action against the La Crosse company, even, and the decree should be affirmed.

JOHN W. CARY,
of Counsel.